



DEPARTMENT OF EDUCATION

34 CFR Part 361

[Docket ID ED-2019-OSERS-0140]

State Vocational Rehabilitation Services Program

AGENCY: Office of Special Education and Rehabilitative
Services, Department of Education

ACTION: Final interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this final notification of interpretation (NOI) in response to comments made on the NOI published in the *Federal Register* on February 28, 2020. That NOI became effective on the date it was issued and clarified current policy regarding the permissibility of using funds reserved for pre-employment transition services for auxiliary aids and services, and it announced a change in policy regarding the use of Federal vocational rehabilitation (VR) funds reserved for the provision of pre-employment transition services. The Department's policy expressed in this final NOI is unchanged from that in the NOI published on February 28, 2020.

DATES: This final interpretation is issued: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Pursuant to the NOI, this interpretation is applicable as of February 28, 2020.

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SUPPLEMENTARY INFORMATION:

Background:

The amendments to the Rehabilitation Act of 1973 (Rehabilitation Act) made by title IV of the Workforce Innovation and Opportunity Act (WIOA) place heightened emphasis on the provision of services to students and youth with disabilities to ensure that they have meaningful opportunities to receive the training and other services they need to achieve employment outcomes in competitive integrated employment. The Rehabilitation Act, as amended by WIOA, expanded not only the population of students with disabilities who may receive services under the VR program but also the kinds of services the designated State units (DSUs) may provide to these students with disabilities who are transitioning from school to postsecondary education and employment.

Most notably, section 110(d)(1) of the Rehabilitation Act and 34 CFR 361.65(a)(3)(i) requires States to reserve at least 15 percent of their Federal VR grant for the provision of pre-employment transition services. Section 113(a) of the Rehabilitation Act and 34 CFR 361.48(a) require DSUs for the VR program to use the reserved funds

to provide, or arrange for the provision of, pre-employment transition services to all students with disabilities in need of such services who are eligible or potentially eligible for services under the VR program.

Section 113(b) of the Rehabilitation Act and 34 CFR 361.48(a)(2) list the five required pre-employment transition services that DSUs, in collaboration with local educational agencies (LEAs), must make available to students with disabilities in need of these services. These services are--

- Job exploration counseling;
- Work-based learning experiences, which may include in-school or after school opportunities, or experience outside the traditional school setting (including internships), that are provided in an integrated environment to the maximum extent possible;
- Counseling on opportunities for enrollment in comprehensive transition or postsecondary educational programs at institutions of higher education;
- Workplace readiness training to develop social skills and independent living; and
- Instruction in self-advocacy, which may include peer mentoring.

Pre-employment transition services represent the earliest set of services available for students with disabilities under the VR program, are short-term in nature, and are designed to help students identify career interests.

Following implementation of the pre-employment transition services requirements, the Department received comments from DSUs and other stakeholders regarding: (1) the need for further clarification about the extent to which funds reserved for the provision of pre-employment transition services may be used to pay for auxiliary aids and services; and (2) the ability of States to reserve and expend at least 15 percent of their VR grants on the provision of pre-employment transition services under the Department's general interpretation of the statutory requirements related to the allowable use of funds. Specifically, DSUs and stakeholders asked if funds reserved for pre-employment transition services may be used to cover the costs of auxiliary aids and services provided directly to students with disabilities as well as other VR services, such as transportation, tuition for postsecondary education, rehabilitation technology, and job coaching.

On February 28, 2020, the Department published an NOI in the *Federal Register* (85 FR 11848) to clarify current policy regarding the permissibility of using funds reserved for pre-employment transition services for auxiliary aids

and services, and to announce a change in policy regarding the use of Federal VR funds reserved for pre-employment transition services. There are no changes between the original interpretation published on February 28, 2020, and this final interpretation. Through this document, the Department also rescinds the Dear Director email transmitted to VR agencies on December 28, 2016, regarding the use of reserved funds for the provision of auxiliary aids and services because the substance of that email was incorporated into and clarified by the February 28, 2020, NOI.

Public Comment: In response to our invitation in the NOI, 26 parties submitted comments.

Analysis of Comments and Changes: An analysis of the comments on the interpretation since its publication follows. We do not address comments that raised concerns not directly related to the interpretation.

Support for Interpretation

Comments: Commenters generally expressed appreciation for the flexibilities described in the NOI. Some commenters noted that the flexibilities would allow students with the most significant disabilities to benefit from the expansion of services needed to access and support the provision of pre-employment transition services. One commenter stated that the new flexibilities would promote accountability and strengthen partnership with schools and employers.

Discussion: The Department appreciates the positive comments and feedback regarding this interpretation.

Changes: None.

Use of Reserved Funds for Certain Services

Comments: Commenters stated that postsecondary tuition and fees should be an allowable cost under pre-employment transition services, indicating that the Department's interpretation was too narrow, and that postsecondary training aligns with workplace readiness training under the five required activities and also falls under authorized activities.

Discussion: The Department disagrees that the interpretation is too narrow or unnecessarily restrictive. Pre-employment transition services, including work readiness training, represent the earliest activities in career exploration and are designed to assist students with disabilities to identify their employment goals. On the other hand, financial support for postsecondary education tuition and fees, as authorized by section 103(a)(5) of the Rehabilitation Act and 34 CFR 361.48(b)(6), is provided to individuals transitioning from secondary school to postsecondary education for purposes of achieving a specific employment outcome. Therefore, we continue to maintain that tuition and fees for postsecondary education are outside the nature, scope, and purpose of pre-employment transition services and the required activities

specified in section 113(b) of the Rehabilitation Act and 34 CFR 361.48(a)(2).

In addition, those authorized activities listed in section 113(c) of the Rehabilitation Act and 34 CFR 361.48(a)(3) are systemic in nature and encompass strategies the DSUs develop and use for the delivery of pre-employment transition services. In other words, given the systemic nature of the authorized services listed in section 113(c) of the Rehabilitation Act and 34 CFR 361.48(a)(3), they are not services that are provided directly to students with disabilities, but rather facilitate the systemic delivery of pre-employment transition services. Because financial support for postsecondary education tuition and fees is a service provided directly to eligible individuals with disabilities on an individual basis under an individualized plan for employment (IPE), this service is not within the scope of the authorized activities in section 113(c) of the Rehabilitation Act and 34 CFR 361.48(a)(3).

For these reasons, a DSU may not use the funds reserved for the provision of pre-employment transition services to pay for tuition and other costs of attending postsecondary education, since this is not among those activities that are required or authorized under section 113 of the Rehabilitation Act and 34 CFR 361.48(a), and this service is not necessary for a student with a

disability to access or participate in one of the required pre-employment transition services listed in section 113(b) of the Rehabilitation Act and 34 CFR 361.48(a)(2).

Changes: None.

Comments: One commenter emphasized the importance of driver education training and suggested that it be considered as an allowable service under workplace readiness training.

Discussion: Whether driver education may be considered to be within the scope of workplace readiness training (i.e., development of social skills and independent living) for the purposes of section 113(b) of the Rehabilitation Act and 34 CFR 361.48(a)(2) depends on the circumstances under which this service is provided to any student with a disability. Consistent with the Federal cost principles at 2 CFR 200.403 through 200.405, costs incurred with the funds reserved under section 110(d)(1) of the Rehabilitation Act and 34 CFR 361.65(a)(3)(i) must be--

- Necessary for the provision or receipt of pre-employment transition services;
- Reasonable, that is, those that a prudent person would agree are necessary for the provision or receipt of pre-employment transition services; and
- Allocable, that is, those that benefit the provision or receipt of pre-employment transition services.

Thus, students with disabilities, regardless of whether they have been determined eligible or have an IPE, for example, who live in rural areas lacking public transportation, may need to learn to drive to enhance their independence and ability to explore a wider range of career options. Under this circumstance, it may be reasonable to determine that driver's education would be within the scope of workplace readiness training as described in section 113(b) and 34 CFR 361.48(a)(2) and allocate the cost of this service to the funds reserved for the provision of pre-employment transition services.

However, some students with disabilities may require more advanced driver's education to obtain employment involving public or commercial transportation (e.g., bus or commercial truck driver). It would not be reasonable to conclude that this advanced driver's education is within the scope of pre-employment transition services as workplace readiness training when students have chosen a specific career for which advanced driver's education and a special driver's license is required. Rather, such a service would be considered a job training service provided pursuant to section 103(a)(5) of the Rehabilitation Act and 34 CFR 361.48(b)(6). Under this circumstance, this service must be provided using funds for other VR services (i.e., funds not reserved for the provision of pre-employment transition services) to support the eligible student with a

disability's specific employment goal under an approved IPE.

Changes: None.

Use of Reserved Funds for Auxiliary Aids and Services

Comments: Several commenters recommended that we consider job coaching an auxiliary aid and service and that we not limit the availability of this service to students with significant disabilities who apply and are determined eligible to receive this service under an IPE. Commenters also requested clarification about the differences between job coaches and work site trainers.

Discussion: "Auxiliary aids and services," under the Americans with Disabilities Act's (ADA) title II implementing regulations in 28 CFR 35.104, include services such as the acquisition or modification of equipment or devices, or other effective methods, to make aurally delivered information available to individuals who are deaf or hard of hearing, or visually delivered materials available to individuals who are blind or have low vision. The definition of "auxiliary aids and services" includes effective methods of delivering materials in an alternative format for individuals who are deaf or hard of hearing, or who are blind or have low vision, which are distinct from job coaching services designed to assist individuals with disabilities perform on-the-job tasks. Thus, job coaching services are not

within the scope of auxiliary aids and services for the purpose of providing access to pre-employment transition services using funds reserved under section 110(d) of the Rehabilitation Act. The Department disagrees with the commenter's suggestion that job coaching should be considered an auxiliary aid and service. It has been and continues to be the Department's interpretation, as stated in the NOI, that DSUs may use funds reserved for the provision of pre-employment transition services to pay for auxiliary aids and services needed by all students with disabilities with sensory and communicative disorders who need such aids and services to access or participate in pre-employment transition services (85 FR at 11849-11850).

In addition, the Department disagrees that funds reserved for the provision of pre-employment transition services should be used to pay for costs of job coaching needed by all students with disabilities, regardless of whether they have applied and been determined eligible for the VR program and have an approved IPE. There is no authority under the Rehabilitation Act to provide job coaching or other coaching services to students with disabilities who do not have an approved IPE. As stated in the NOI, DSUs may provide any service that an eligible individual needs to achieve an employment outcome in accordance with an approved IPE. In the context of pre-employment transition services, one such service is

coaching services for eligible students with disabilities participating in work-based learning experiences under section 113(b)(2) and 34 CFR 361.48(a)(2)(ii). These coaches perform functions similar to job coaches in supported employment settings by assisting the eligible student with a disability to perform the tasks assigned during the work-based learning experiences. While these particular coaching services are not specifically listed in section 103(a), they would be considered allowable VR services under section 103(a) and 34 CFR 361.48(b)(21) if needed by an eligible student with a disability, in accordance with an approved IPE, to participate in pre-employment transition services. Given that pre-employment transition services are among the earliest types of services available to students with disabilities, it is reasonable to expect that these eligible students may need extra assistance through coaching services to participate in these activities and, thus, these coaching services would be allocable to those pre-employment transition services. Therefore, DSUs may use funds reserved for the provision of pre-employment transition services to pay for the costs of coaching services when needed by eligible students with disabilities to participate in a work-based learning experience pursuant to an IPE, and when costs would be reasonable and allocable to the provision of pre-

employment transition services in accordance with requirements governing Federal cost principles.

Changes: None.

Administrative Costs

Comments: One commenter recommended that the 15 percent reserve be used to fulfill data collection requirements associated with pre-employment transition services.

Discussion: The Department acknowledges the recommendation; however, fulfilling data collection requirements associated with pre-employment transition services is an administrative cost and section 110(d)(2) of the Rehabilitation Act and 34 CFR 361.65(a)(3)(ii)(B) prohibit the use of funds reserved for pre-employment transition services to pay for administrative costs. DSUs can use other VR grant funds not reserved for the provision of pre-employment transition services to pay these administrative costs.

Changes: None.

Services for Potentially Eligible Students with Disabilities

Comments: A few commenters emphasized the need for additional flexibilities surrounding the 15 percent reserve funds and allowable services. Specifically, they commented on the importance of foreign language interpreters and transportation services for potentially eligible students

and their families to facilitate access to pre-employment transition services.

Discussion: The Department appreciates the comments related to the scope and types of services that may be charged to the minimum of 15 percent reserved funds for pre-employment transition services for potentially eligible and eligible students with disabilities. We believe the issue of foreign language interpreters is different from that of transportation and must be handled separately. Section 101(a)(7)(C) of the Rehabilitation Act and 34 CFR 361.18 require States to assure in the VR services portions of their Unified or Combined State Plans that they will establish and maintain minimum standards to ensure DSU personnel or other individuals are available to communicate in the native language or mode of communication of applicants, recipients of VR services, and eligible individuals. As such, it is the responsibility of the DSUs to ensure that their staff are trained to communicate in the native language of VR program participants, including students with disabilities receiving pre-employment transition services. If such staff are not available because of personnel turnover or other reasons, it would be necessary and reasonable under the Federal cost principles for a DSU to use VR funds to pay for such an interpreter so that the individual with a disability could access the service. This would be true for any student with a

disability who needs such interpreter services to access pre-employment transition services. However, these expenditures would be considered administrative costs to the VR agency. As such, they may not be paid with funds reserved for the provision of pre-employment transition services since these reserved funds may not be used to pay for administrative costs, pursuant to section 110(d)(2) of the Rehabilitation Act, regardless of whether the student with a disability has been determined eligible for the VR program.

With respect to transportation costs to and from the pre-employment transition services, whether a DSU may use funds reserved for the provision of pre-employment transition services for these expenditures depends on whether the student with a disability has been determined eligible for the VR program and whether he or she has an approved IPE. For potentially eligible students with disabilities, the DSU may provide only the five required pre-employment transition services in section 113(b) of the Rehabilitation Act, as well as auxiliary aids and services, as appropriate. As such, funds reserved for the provision of pre-employment transition services may be used to cover only these costs with respect to those students with disabilities who have not yet been determined eligible for the VR program and who do not have an approved IPE (i.e., potentially eligible students with disabilities). Any

other VR service (e.g., transportation) needed by a student with a disability to participate in pre-employment transition services could only be provided once the student with a disability has been determined eligible for the VR program and has an approved IPE that lists the other service as necessary for the participation in pre-employment transition services. Therefore, transportation for potentially eligible students with disabilities would not be chargeable to the reserved funds. By contrast, for eligible students with disabilities, section 103(a) of the Rehabilitation Act authorizes the provision of VR services under an IPE. To the extent that transportation services are necessary to support the eligible student with a disability's participation in pre-employment transition services and are identified on the IPE, the reasonable cost of such services may be charged to the reserved funds.

Changes: None.

Order of Selection

Comments: Two commenters noted a need to extend the flexibilities described in the interpretation to students determined eligible for VR services but who are placed on a waiting list due to a State's implementation of an order of selection.

Discussion: As noted in existing guidance, if a student with a disability begins one or more of the required pre-employment transition service activities prior to being

determined eligible for VR services, the eligible student with a disability may continue to receive all pre-employment transition services even if the student is assigned to a closed order of selection category. In addition to the pre-employment transition services, the student may participate in group transition services, as described in section 103(b)(7) of the Rehabilitation Act and in accordance with 34 CFR 361.49(a)(7), while in a closed order of selection category. For a student with a disability who has not begun receiving pre-employment transition services and has been determined eligible for the VR program and placed into a closed order of selection priority category, VR agencies may provide general transition services that benefit a group of students with disabilities, as described above, to ensure the continuation of beneficial services. However, those students may not begin pre-employment transition services (see 81 FR 55691-55693).

Changes: None.

Application of Interpretation

Comments: Commenters asked if the flexibilities discussed in the NOI are applicable to services provided, and costs incurred, on or before October 1, 2020.

Discussion: The Department clarifies that the effective date for the interpretations in the NOI is February 28, 2020. As such, the effective date is well before the

October 1, 2020, date mentioned by the commenters. With respect to the application of these flexibilities to expenditures incurred prior to February 28, 2020, the Department believes it would be reasonable and permissible to allow DSUs to make accounting adjustments, as appropriate, to cover the costs of these additional expenditures described in the NOI with funds reserved for the provision of pre-employment transition services incurred at any time after July 22, 2014, when the requirements of sections 110(d) and 113 of the Rehabilitation Act took effect, so long as DSUs can document that the expenditures were incurred for the provision of pre-employment transition services for students with disabilities. We believe it would be reasonable and permissible to allow such accounting of funds, as described in the NOI, because doing so will be a benefit to all States in making it easier for them to satisfy the Federal requirements of sections 110(d)(1) and 113(a) of the Rehabilitation Act, which took effect July 22, 2014, to reserve and expend at least 15 percent of the State's VR grant on the provision of these services, and will not harm any State. If a DSU wants to make accounting adjustments on previously submitted financial reports, for purposes of satisfying the pre-employment transition services requirements, so that reserved funds may be used to pay for the expanded costs described in the NOI, DSUs

must be able to document that the expenditures were incurred for the provision of pre-employment transition services or to support the receipt of those services as described in the NOI. States should contact their Rehabilitation Services Administration (RSA) Financial Management Specialists to make changes in their expenditures reported for pre-employment transition services.

Changes: None.

Changes Requiring Statutory Amendment

Comments: A few commenters requested the Department consider the following changes to the interpretation: (1) allowing States to expend reserved funds on students who have reached the maximum age for receiving pre-employment transition services but were unable to complete services because of the State's statutory age limit; (2) reducing the requirement for States to reserve 15 percent of their grant allotment for the provision of pre-employment transition services to enable States to meet the needs of other individuals seeking VR services; and (3) making pre-employment transition services available to students with disabilities who have dropped out of school.

Discussion: The Department acknowledges the various recommendations offered by commenters related to extending the maximum age requirements for receiving pre-employment transition services, reducing the amount of Federal VR

allotments States are required to reserve for pre-employment transition services to enable them to meet the needs of other individuals seeking VR services, and broadening the population of individuals eligible for pre-employment transition services to include youth with disabilities not in school. These recommendations would require statutory changes and, therefore, cannot be implemented by the Department through an interpretation of existing law.

Changes: None.

Miscellaneous

Comments: Commenters recommended improvements in the quality of services related to pre-employment transition services, noting a need to ensure parity of access across States with services provided by credentialed staff with skills and knowledge specific to students with disabilities.

Discussion: In accordance with 34 CFR 361.48(a)(1), pre-employment transition services must be made available statewide to all students with disabilities, regardless of whether the student has applied or been determined eligible for VR services. Within this context, the Department agrees there is a need to ensure quality services and parity of access to students with disabilities; however, the delivery and provision of pre-employment transition services is unique to each State, and each State has the

responsibility for ensuring that the needs of students with disabilities for pre-employment transition services are appropriately met.

Changes: None.

Comments: Commenters posed specific questions and provided input about the implementation of pre-employment transition services and services on behalf of students with disabilities, including during the COVID-19 pandemic, that were not specific to the flexibilities addressed in the NOI. These included a suggestion for collaboration between VR and the Social Security Administration related to work-related expenses, accommodations, and benefits planning; disability-specific flexibilities; the negative impact of the COVID-19 pandemic on pre-employment transition services; concerns for students with disabilities found ineligible for the VR program; the continuum of transition services; and requests for clarification about the differences between job coaches and work site trainers.

Discussion: The Department appreciates all comments and questions related to the implementation of pre-employment transition services and has addressed specific questions regarding the COVID-19 pandemic and the provision of pre-employment transition services in Frequently Asked Questions documents posted on <https://rsa.ed.gov/whats-new?page=1>. We will continue to provide additional guidance and clarification as requested on the

implementation of pre-employment transition services and invite direct communication with RSA State liaisons and the National Technical Assistance Center on Transition: the Collaborative (NTACT:C) funded by RSA at

<https://transitionta.org/>.

Changes: None.

Final Policy Interpretation

The Department maintains without change its interpretation published in the *Federal Register* on February 28, 2020, and available at <https://www.federalregister.gov/documents/2020/02/28/2020-03208/state-vocational-rehabilitation-services-program>. In that interpretation, the Department clarified current policy that DSUs may use VR funds reserved under section 110(d)(1) of the Rehabilitation Act and 34 CFR 361.65(a)(3)(i) to pay for auxiliary aids and services needed by all students with disabilities (i.e., both eligible and potentially eligible students with disabilities) who have sensory and communicative disorders to access or participate in pre-employment transition services. "Auxiliary aids and services," under the ADA's title II implementing regulations in 28 CFR 35.104, includes the acquisition or modification of equipment or devices, or other effective methods, to make aurally delivered information available to individuals who are deaf or hard of hearing, or visually delivered materials

available to individuals who are blind or have low vision. Through this interpretation, the Department also announced a change in policy with respect to additional VR services needed by eligible students with disabilities that may be paid for with Federal VR grant funds reserved for the provision of pre-employment transition services, including the circumstances under which those funds may be used to pay for those additional VR services. DSUs may use the reserved funds to pay for those additional VR services that are needed by eligible students with disabilities to participate in the receipt of pre-employment transition services. These services are described in section 103(a) of the Rehabilitation Act and 34 CFR 361.48(b) and are provided in accordance with an approved IPE. Further, under this interpretation, the Department clarifies that the flexibilities discussed in the interpretation may be applied to services provided, and costs incurred, prior to February 28, 2020, at any time after July 22, 2014, when the requirements of sections 110(d) and 113 of the Rehabilitation Act took effect -- so long as DSUs can document expenditures for pre-employment transition services in any given year following the amendments to the Rehabilitation Act made by title IV of WIOA. This interpretation is consistent with the "Statement of the Managers to Accompany the Workforce Innovation and Opportunity Act," the statutory purpose for the reservation

of these Federal VR funds, and the fiscal requirements of the Office of Management and Budget's (OMB) Uniform Guidance.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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Katherine Neas,

*Deputy Assistant Secretary,
delegated the authority to perform
the functions and duties of the
Assistant Secretary for the Office
of Special Education and
Rehabilitative Services.*

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